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(2)

No. 09-70

In The
Supreme Court of the United States

MODERN, INC., et al.,

Petitioners,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE ST. JOHNS RIVER WATER MANAGEMENT DISTRICT IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

(1) Whether jurisdiction is lacking over this appeal because Modern seeks to assert an issue that is outside the scope of the trial proceedings and seeks to collaterally attack a final decision of the Florida courts in the administrative enforcement action, whereby it was determined that Modern was required to obtain a permit in order to excavate certain drainage ditches prior to draining its property.

(2) Whether inverse condemnation by flooding occurs under the Florida Constitution where a landowner ditches and drains flooded, wetland-containing property he purchased and, upon discovery of the unpermitted dredging, is required to obtain an after-the-fact permit or restore the illegal dredging.

(3) Whether this court should provide an advisory opinion as to the effect of *San Remo Hotel, L.P. v. City & County of San Francisco, California* on Modern's reserved federal takings claims.

(4) Whether an upper landowner enjoys a common law drainage easement under Florida law in drainage ditches existing on lower property.

(5) Whether this court should entertain a claim of "judicial taking" that was not raised below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

STATEMENT OF THE FACTS AND CASE..... 1

REASONS FOR DENYING THE PETITION 10

I. THIS COURT LACKS JURISDICTION BECAUSE MODERN FAILED TO TIMELY APPEAL ITS REGULATORY TAKING CLAIM TO THE FLORIDA SUPREME COURT AND THIS COURT AFTER THE *MODERN* STATE COURT DECISION, AND BECAUSE MODERN'S REGULATORY TAKING CLAIM IS OUTSIDE THE SCOPE OF THE PROCEEDINGS BELOW 10

II. INVERSE CONDEMNATION BY FLOODING DOES NOT OCCUR UNDER THE FLORIDA CONSTITUTION WHERE A LANDOWNER PURCHASES FLOODED, WETLAND-CONTAINING PROPERTY, DITCHES AND DRAINS THE LAND, AND, UPON DISCOVERY, IS REQUIRED TO OBTAIN AN AFTER-THE-FACT PERMIT OR RESTORE THE ILLEGAL DREDGING 12

A. The Petition Requires Review of Factual Findings and the Application of State Law to the Facts 12

TABLE OF CONTENTS – Continued

Page

B. *Loretto* and Its Progeny Do Not Conflict With the Decision Below 14

C. There Is No Legal Right Under Florida Law to Immediately Abate Flooding..... 19

III. THIS COURT NEED NOT OFFER AN ADVISORY OPINION AS TO THE EFFECT OF *SAN REMO HOTEL, L.P. v. CITY & COUNTY OF SAN FRANCISCO, CALIFORNIA,* ON MODERN'S RESERVED FEDERAL TAKINGS CLAIMS..... 22

IV. THE DECISION BELOW PROPERLY REFUSED TO QUIET TITLE IN MODERN'S FAVOR TO A NONEXISTENT FLORIDA COMMON LAW DRAINAGE EASEMENT IN DITCHES ON THE LOWER PROPERTY 23

A. The Issue Involves Only State Law and is Not of Constitutional Dimensions 24

B. Under Florida Law, An Upper Landowner Does Not Enjoy A Common Law Drainage Easement to Improve and Maintain Drainage Ditches Across The Lower Owner's Property 25

TABLE OF CONTENTS – Continued

Page

V. THERE COULD NOT BE A JUDICIAL TAKING BECAUSE AN UPPER LANDOWNER DOES NOT ENJOY A COMMON LAW DRAINAGE EASEMENT UNDER FLORIDA LAW IN DRAINAGE DITCHES EXISTING ON LOWER PROPERTY, EVEN ASSUMING SUCH A TAKING CLAIM EXISTS AND IT PROPERLY COULD BE BROUGHT HERE FOR THE FIRST TIME IN THIS APPEAL 33

CONCLUSION 35

TABLE OF AUTHORITIES

Page

CASES

Allegheny City General Hospital v. NLRB, 608 F.2d 965 (3rd Cir. 1979) 15

Azul Pacifico, Inc. v. City of Los Angeles, 948 F.2d 575 (9th Cir. 1991) 17, 18

Boise Cascade Corp. v. U.S., 296 F.3d 1339 (Fed. Cir. 2002) 17, 18

Braxton v. U.S., 500 U.S. 344 (1991) 25

Duval v. Thomas, 114 So. 2d 79 (Fla. 1959) 27

Edason v. Denison, 142 Fla. 101, So. 342 (Fla. 1940) 30

F.C.C. v. Florida Power Corp., 480 U.S. 245, 107 S.Ct. 1107 (1987) 15

Glisson v. Alachua County, 558 So. 2d 1030 (Fla. 1st DCA 1990), *rev. denied*, 570 So. 2d 1304 (Fla. 1990) 17

Gus Machado Buick, Inc. v. Westland Skating Center, Inc., 542 So. 2d 959 (Fla. 1989) ... 25, 29, 30, 31

Lamb v. Dade County, 159 So. 2d 477 (Fla. 3d DCA 1964) 31, 32

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) 15

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) ..... *...passim*

McDonald, Sommer & Frates, 106 S.Ct. 2561 (1986) 17

TABLE OF AUTHORITIES – Continued

Page

North Carolina v. Rice, 404 U.S. 244 (1971) 23

Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) 24, 33

Palazzolo v. Rhode Island, 533 U.S. 606 (2001).....16, 34, 35

President of the Corporation of Jesus Christ of Latter-Day Saints v. St. Johns River Water Management District, 489 So. 2d 59 (Fla. 5th DCA 1986) 5

Rubano v. Dept. of Transp., 656 So. 2d 1264 (Fla. 1995) 13

St. Johns River Water Management Dist. v. Modern, Inc., 784 So. 2d 464 (Fla. 1st DCA 2001) 5, 6, 9, 11

San Remo Hotel v. City and County of San Francisco, 545 U.S. 323 (2005).....22

Seminole County v. Mertz, 415 So. 2d 1286 (Fla. 5th DCA 1982), *rev. denied*, 424 So. 2d 763 (Fla. 1982) 29, 30

South Florida Water Management Dist. v. Basore of Florida, Inc., 723 So. 2d 287 (Fla. 4th DCA 1998).....12

Southwest Florida Water Management Dist. v. Charlotte County, 774 So. 2d 903 (Fla. 2d DCA 2001) 21

Stoll v. MacPherson Duck Club, Ltd., 607 P.2d 1019 (Colo. Ct. App. 1979) 32

TABLE OF AUTHORITIES – Continued

Page

Taylor v. City of Riviera Beach, 801 So. 2d 259 (Fla. 4th DCA 2001), *rev. denied*, 821 So. 2d 293 (Fla. 2002) 17

U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 16

Village of Tequesta v. Jupiter Inlet Corp., 371 So. 2d 663 (Fla. 1979) 21

Wester v. Rigdon, 110 So. 2d 470 (Fla. 1st DCA 1959) 21

Yee v. City of Escondido, Cal., 503 U.S. 519 (1992) 15

STATUTES

Chapter 120, Fla. Stat. 3

Chapter 373, Fla. Stat. 20, 21, 26

Section 2.01, Fla. Stat. 20, 21, 26, 27

Section 373.403(5), Fla. Stat. 4

Section 373.413, Fla. Stat. 3, 4, 5

Section 373.416, Fla. Stat. 3, 4, 5

Sections 403.813(f) and (g), Fla. Stat. 5

FEDERAL STATUTES

28 U.S.C. §1738 22

28 U.S.C. §2409(a) 6, 24

TABLE OF AUTHORITIES – Continued

Page

RULES

Rule 40C-4.021(26), Florida Administrative Code 4

Rule 40C-4.041(2)(b)2, Florida Administrative Code 4

COURT RULES

Supreme Court Rule 10 ..... 14, 22

Supreme Court Rule 15 19

OTHER

1884 Blackstone *Commentaries on the Laws of England* 25, 26, 27

F. Maloney, S. Plager, R. Ausness, B. Canter, *Florida Water Law* 617 (1980) 29, 30

STATEMENT OF THE FACTS AND CASE

This case involves a landowner who purchased flooded, wetland-containing property, drained the property without a permit, and then claimed that St. Johns' enforcement of Florida's permitting regulations constituted a flood-taking of the illegally drained property.

Modern owns property, purchased in 1991, that is located adjacent to the southeast corner of the St. Johns National Wildlife Refuge (the "Refuge"). (Amended Memorandum Opinion, Doc. 458, at 4-5; hereafter "Opinion"). In its natural state, the property Modern purchased was wetlands because it is part of the St. Johns River flood plain. *Id.* at 29. That flood plain tract from which Modern deraigned title "consisted largely of flat marshland." *Id.* at 2. In the early 1900s, the floodplain was ditched and drained by a land development company. *Id.* at 2, 29. The last evidence of ditch maintenance was in 1958. *Id.* at 29. After 1958, the system of ditches began a natural process of erosion and degradation. *Id.* Without a functioning drainage system, most of Modern's property would be jurisdictional wetlands. *Id.* at 6.

Ditches EW1 and NS1 are "the essential drainage features" of Modern's property. *Id.* at 29. Flooding due to poor drainage is caused primarily by the blockages at EW1 and NS1 near their intersection. *Id.* at 28, n.30. The District Court expressly found "aerial photography *clearly shows* that occlusions existed at these locations [EW1 and NS1] in 1991

when Modern purchased the property." *Id.* (emphasis added). Significant portions of these ditches were obstructed, greatly reducing their ability to drain Modern's property. *Id.* at 7.

In January 1997, Modern dredged portions of EW1 and NS1 on and near its property. *Id.* EW1 was made wider and deeper from its intersection with NS1 a short distance to the east. *Id.* NS1 was made wider and deeper from a short distance north of EW1 all the way south to State Road 50. *Id.* The dredging was "extremely effective, moving a tremendous volume of water off of Modern's property." *Id.* The water first moved west through newly excavated EW1 and then to the south through newly excavated NS1. *Id.* The dredging eventually lowered water levels across hundreds of acres of open water and wetlands, primarily on the Refuge, but also on Modern's property. *Id.* Modern did not obtain a permit from St. Johns for its dredging of EW1 and NS1. *Id.* at 7.

The United States Fish and Wildlife Service ("USFWS") feared the lower water levels would harm species on the Refuge and complained to St. Johns. *Id.* On April 1, 1997, shortly after the illegal dredging was discovered, St. Johns sent Modern a letter advising Modern of its options for coming into compliance with Florida's statutes and rules. (Pl. Ex. A-116). Although one option was for Modern to apply for an after-the-fact permit for the dredging, *id.* at 2, Modern declined to do so. (T:184-185).

On May 14, 1997, St. Johns entered an Emergency Order that authorized USFWS to install earthen weirs in EW1 and NS1 to undo the effects of the unpermitted dredging. *Id.* at 7. USFWS then installed weirs on Refuge property in NS1 and EW1 at heights that would restore the ditches to the depths that existed just before Modern's unpermitted dredging – 11.7 feet in EW1 and 12.7 feet in NS1. *Id.*

On August 27, 1997, St. Johns filed an Administrative Complaint and Proposed Order (Pl. Ex. A-119), alleging that Modern excavated portions of EW1 and NS1 without a permit, and proposing as corrective action two ways in which Modern could effectively restore the pre-excavation depths of those ditches. *Id.* at 8. Modern administratively challenged both agency actions under Chapter 120, Florida Statutes (Florida's Administrative Procedure Act). The administrative law judge ("ALJ") issued his recommended order (Pl. Ex. A-281, Ex. 1; "Recommended Order"), which determined that Modern's dredging required a permit under the statutes and rules enforced by St. Johns and that Modern's failure to obtain a permit violated Florida law.[1]

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[1] The ALJ accurately described St. Johns' surface water permitting program as follows:

> Pursuant to Sections 373.413 and 373.416, the District requires an environmental resource permit (a "permit") to assure that activities such as construction, alteration, maintenance, or operation, will not be

(Continued on following page)

> harmful to the water resources of the state and will be consistent with the overall objectives of the District.

(Recommended Order at ¶140). He ultimately found that Modern's excavation of EW1 and NS1 was a violation of those provisions:

> Pursuant to Sections 373.413 and 373.416, Modern was required to obtain a permit for the excavation of NS1, EW1, and the larger system in January 1997. Modern neither applied for nor obtained a permit for the excavation.
>
> Modern violated the permitting requirements authorized in Sections Chapter 373.413 and Chapter 373.416. Modern is subject to the proposed agency action in the Administrative Complaint.

(Recommended Order at ¶¶350-51). The support for this conclusion came from specific findings of fact made by the ALJ. The ALJ found that NS1, EW1, and the larger system are "works" as defined by section Chapter 373.403(5), Florida Statutes, because NS1 and EW1, and the larger system, are each:

> . . . artificial structures, including . . . ditches, canals, conduits, channels . . . and other construction that connects to, draws water from, drains water into . . . waters in the state.

(Recommended Order at ¶143). In addition, the ALJ found that NS1, EW1, and the larger system are each a "surface water management system" as defined in Rule 40C-4.021(26), Florida Administrative Code ("FAC"), because "works" are included within the definition of "surface water management system." (Recommended Order at ¶144). The ALJ also found that Rule 40C-4.041(2)(b)2, FAC, requires a permit for the construction, alteration, maintenance, or operation of a "surface water management system" if the system serves a project with a total land area equal to or exceeding forty acres, and that NS1 and EW1 each tripped this forty acre permitting threshold. (Recommended Order at ¶¶148-49). The ALJ ultimately found that Modern's dredging of EW1 and NS1 violated the permitting requirements

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The ALJ also rejected Modern's claim that its dredging of NS1 and EW1 was merely "routine custodial maintenance."[2] (Recommended Order at ¶386). To constitute "routine custodial maintenance," dredging can have no more than a minimal adverse environmental impact. *President of the Corporation of Jesus Christ of Latter-Day Saints v. St. Johns River Water Management District*, 489 So. 2d 59, 60-61 (Fla. 5th DCA 1986) ("the legislature intended to exclude only routine custodial maintenance having a minimal adverse environmental impact from permit requirements."). The ALJ found that Modern's unpermitted ditch excavation drained "approximately 600 to 800 acres of wetlands." (Recommended Order at ¶106). The draining of hundreds of acres of wetlands is not a "minimal adverse environmental impact."

The ALJ recommended to St. Johns' Governing Board that it enter a final order upholding the Emergency Order and proposed corrective actions. (Recommended Order at 187). The Governing Board adopted these recommendations in a single final order (Pl. Ex. A-281, Ex. A), which was affirmed "in all respects" by Florida's First District Court of Appeal. *St. Johns River Water Management Dist. v. Modern, Inc.*, 784 So. 2d 464 (Fla. 1st DCA 2001) (hereafter "the

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authorized in sections Chapter 373.413 and Chapter 373.416, Florida Statutes. (Recommended Order at ¶351).

[2] The "routine custodial maintenance" of ditches and canals is exempt from St. Johns' permitting requirements under sections 403.813(f) and (g), Florida Statutes.

Modern decision"). Modern took no further judicial appeal of this decision. By July of 2003, Modern had substantially complied with the Final Order's restoration requirement by bulldozing excavated spoil back into NS1 so as to fill in 500 feet of NS1 just south of the intersection with EW1. (Opinion at 8-9).

In 2003, Modern filed a Second Amended Complaint in the Eighteenth Judicial Circuit of Florida against the State of Florida Department of Transportation ("FDOT"), St. Johns, and USFWS. (Doc. 4). USFWS removed the case to the United States District Court for the Middle District of Florida. (Doc. 1).

Modern then filed a Third Amended Complaint. (Doc. 45). All of the defendants moved to dismiss. (Doc. 46, 47 and 51). As to St. Johns, the court dismissed counts sounding in equal protection, due process, trespass, nuisance, and estoppel, and denied dismissal as to counts sounding in inverse condemnation and declaratory and injunctive relief. (Doc. 70).

Modern then filed the Fourth Amended Complaint (hereafter "Complaint") that is the subject of this appeal, asserting five counts, being: Count I (inverse condemnation as to St. Johns); Count II (inverse condemnation as to FDOT); Count III (declaratory relief as to St. Johns and FDOT); Count IV (quiet title as to USFWS under 28 U.S.C. §2409(a) to various types of alleged drainage easements over Refuge property) and Court V (injunctive relief against St. Johns and FDOT). (Doc. 71). Modern filed

for summary judgment against St. Johns (Doc. 289-1), which was denied in part and granted in part. (Doc. 318 at 28). St. Johns filed a motion for summary judgment against Modern (Doc. 204), which was granted as to Count III and denied in all other respects. (Doc. 330 at 15). St. Johns' motion asserted, *inter alia*, that Modern was seeking to assert a regulatory taking claim against St. Johns based upon the theory that flooding induced by permits St. Johns had issued to FDOT and others had caused Modern's land to be converted from uplands to wetlands, which would result in a denial of development permits by Brevard County, and that this claim was not ripe for adjudication because Modern had failed to apply for a development permit from the county. (Doc. 204 at 2-9). In response, Modern argued that it was not seeking to assert a regulatory taking claim on that basis. (Doc. 247 at 2). The District Court, in denying summary judgment, accepted Modern at its word, stating: "This is a physical takings case, not a regulatory taking case." (Doc. 330 at 7). However, despite clear direction to proceed to trial on a physical taking theory, Modern devoted considerable effort at trial to show that the preceding regulatory denial of the maintenance exemption was the gravamen of Modern's claim against St. Johns. (Transcript: 1170-71; 1542-43).[3]

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[3] On being pressed by the trial judge about the alleged causes of Modern's flooding, Modern's hydrologist expert, Robert Sprinkle, acknowledged that the bulk of the alleged flooding was

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Modern proceeded to trial against St. Johns on a claim of "inverse condemnation by way of flooding." (Opinion at 9). The District Court conducted a three-week bench trial on the issues that had not been resolved by the pretrial motions. (Doc. 401; transcripts). The court made the following relevant findings about the restoration work:

> The subsequent placement of the weirs and filling-in of NS1 merely restored the blockages that existed before the improper dredging. The Plaintiffs presented no evidence to suggest that the weirs or the restored NS1 had elevations higher than those set forth by St. Johns in the Emergency Order or the administrative proceeding.

(Opinion at 28 n.30). "The weirs and the filling-in of 500 feet of NS1 . . . merely reestablished the status quo as it existed before Modern's unpermitted dredging." *Id.* at 24. "Modern's property is wet because it was historically wet and because the 75-year-old system of drainage ditches is no longer viable." *Id.* at 30.

Modern's president admitted that, as of the time of trial, Modern had never applied for a permit to excavate EW1, NS1, or any other drainage ditches near Modern's property. (Transcript: 184-85). St. Johns'

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due to the occlusions in NS1 and EW1 that Modern had excavated without a permit and been required to restore to the pre-excavation status quo. (Transcript: 1170-71).

director of enforcement confirmed at trial that Modern has always had the ability to apply for a permit to drain its property. (T: 1545).

After reviewing all of the testimony and trial exhibits pertaining to a physical flood taking, the court's ultimate finding of fact was that:

> there is no evidence to suggest that any activities of St. Johns . . . could have caused the property to flood several years [after its purchase]. In short, Modern's claim that the conduct of those Defendants caused his property to flood after 1991 simply does not add up.

(Opinion at 29-30). The District Court entered judgment for St. Johns on Modern's inverse condemnation by flooding claim. *Id.* at 30. It declined to quiet title in Modern's favor as to any kind of drainage easement, and entered judgment for the United States. *Id.*

Modern then filed a motion to alter or amend the judgment, in which Modern again asserted, *inter alia,* its claim against St. Johns based upon the *Modern* decision's denial of the maintenance exemption. (Doc. 466 at 19-22). St. Johns responded that Modern was seeking to assert a regulatory taking claim, and collaterally attacking a final judgment of the Florida courts. (Doc. 471 at 4-5). The District Court agreed and denied the motion, stating:

> Finally, the Plaintiffs' argument that St. Johns caused its property to flood by refusing

> to allow it to excavate canals without a permit runs afoul of its repeated contentions that this is not a regulatory takings case. It also constitutes an improper collateral attack on the decision of the state court, upholding the actions taken by St. Johns.

(Doc. 476 at 4).

Modern has continued to pursue its regulatory taking claim involving denial of the maintenance exemption as the gravamen of its complaint against St. Johns in its appeal before the Eleventh Circuit and in the Petition before this Court.

REASONS FOR DENYING THE PETITION

I. THIS COURT LACKS JURISDICTION BECAUSE MODERN FAILED TO TIMELY APPEAL ITS REGULATORY TAKING CLAIM TO THE FLORIDA SUPREME COURT AND THIS COURT AFTER THE *MODERN* STATE COURT DECISION, AND BECAUSE MODERN'S REGULATORY TAKING CLAIM IS OUTSIDE THE SCOPE OF THE PROCEEDINGS BELOW.

Modern's entire argument on appeal before the Eleventh Circuit and this Court is contrary to the representation Modern made on the record below that it was not asserting a regulatory taking claim. (Doc. 247 at 2). The lower court accepted Modern's contention in denying summary judgment for the District

(Doc. 330 at 7) and adjudicated the case on a physical taking theory, determining *on the facts* that Modern's land had not been physically invaded by any act of the water management district or the other defendants. This factual determination has not been challenged in this appeal. Instead, Modern's entire argument is based upon having been required to obtain a permit before it could drain its land, which, as explained below, is at best an unripe regulatory taking claim because Modern has never sought to obtain any permit. In actuality, Modern is seeking to collaterally attack the earlier ruling of the Florida appellate court in the *Modern* decision, in which it was determined that Modern was required to obtain a permit for the subject activity. The District Court so noted in its order denying Modern's motion to alter or amend the final judgment. (Doc. 476 at 4).

The state court *Modern* decision was entered on March 8, 2001. Modern did not make a further appeal of that decision. Thus, while the gravamen of Modern's appeal herein is a facial challenge to the requirement to obtain a permit before excavating drainage ditches under an "immediate self-help" theory, jurisdiction is lacking because Modern failed to timely appeal the state court *Modern* decision to this Court.

II. INVERSE CONDEMNATION BY FLOODING DOES NOT OCCUR UNDER THE FLORIDA CONSTITUTION WHERE A LANDOWNER PURCHASES FLOODED, WETLAND-CONTAINING PROPERTY, DITCHES AND DRAINS THE LAND, AND, UPON DISCOVERY, IS REQUIRED TO OBTAIN AN AFTER-THE-FACT PERMIT OR RESTORE THE ILLEGAL DREDGING.

A. The Petition Requires Review of Factual Findings and the Application of State Law to the Facts.

Modern's taking claim is brought exclusively under Florida's Constitution. (Doc. 71, ¶¶6, 46, 47). Modern reserved any inverse condemnation by flooding claim it might have under the United States Constitution. (Complaint, ¶44). Accordingly, Modern's flood taking argument is purely one of Florida law.

Under Florida law, "to support a claim for inverse condemnation associated with flooding, the flooding must be an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property." *South Florida Water Management Dist. v. Basore of Florida, Inc.*, 723 So. 2d 287, 288 (Fla. 4th DCA 1998) (internal quotations and citations omitted). Thus, Florida flood-taking law does not conflict with *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) ("*Loretto*").

Under Florida law, an essential element of a flood-taking action is proof that the government

defendant caused the flooding. *Rubano v. Dept. of Transp.*, 656 So. 2d 1264, 1266 (Fla. 1995). Here, the District Court found that the property Modern claims was flooded by St. Johns was in fact already flooded when Modern purchased the property: "Charles Moehle contends that . . . the property was dry when Modern purchased it in 1991 . . . but that contention is **strongly rebutted** by the evidence." (Opinion at 29; emphasis added). The District Court's ultimate finding of fact was:

> there is no evidence to suggest that any activities of St. Johns . . . could have caused the property to flood several years [after its purchase]. In short, Modern's claim that the conduct of those Defendants caused his property to flood after 1991 simply does not add up.

(Opinion at 29-30). Since St. Johns did not cause flooding of Modern's property, the District Court correctly denied Modern's inverse condemnation claim.

Modern has not formally challenged these factual findings in its appeal. Instead, Modern seeks to characterize this appeal as involving a conflict between the District Court's application of Florida takings law to the facts of this case and the United States Constitution, as interpreted by this Court. However, in the absence of a factual finding of a physical invasion, there can be no taking, whether considered under the Florida or United States Constitution. In reality, Modern is complaining about what it believes

are erroneous factual findings by the District Court and misapplication of a rule of state law by the District Court. This Court usually does not review such matters. Supreme Court Rule 10. For this reason alone, the Petition should be denied.

B. *Loretto* and Its Progeny Do Not Conflict With the Decision Below.

Modern acknowledges that in 1972 the Florida Legislature authorized Florida's water management districts, including St. Johns, to require permits for construction and maintenance of drainage ditches and canals. (Petition at 4-5, n.3). Modern purchased flooded property almost 20 years after the permitting requirements came into existence Over 25 years after enactment of these permitting requirements, Modern ditched and drained its wetland-containing property without the necessary permit. Through extensive enforcement proceedings, St. Johns required Modern to either obtain an after-the-fact permit for the illegal ditch dredging or restore what had been illegally dredged. (Pl. Ex. A-281, Ex. A). Modern chose not to apply for an after-the-fact permit. Instead, Modern restored its illegal dredging.

The decision below does not conflict with *Loretto* because the material facts are completely different. "A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a

subsequent case involving identical or similar material facts . . . " *Allegheny City General Hospital v. NLRB*, 608 F.2d 965, 969-70 (3rd Cir. 1979). Had *Loretto* involved the requirement to obtain a permit before removing cables and cable boxes from a building, and had this Court held in *Loretto* that requiring a permit for such removal constituted a physical occupation of property that was a per se taking, then arguably there could be a conflict between the case at bar and *Loretto*. However, *Loretto* had nothing to do with a permitting requirement of this nature.

A taking occurs under *Loretto* "where government *requires* an owner to suffer a *permanent* physical invasion of her property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (describing *Loretto*) (emphasis added). As this Court said in *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 527 (1992), "The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land. This element of required acquiescence is at the heart of the concept of occupation." (emphasis in original; quotations omitted; *citing*, *F.C.C. v. Florida Power Corp.*, 480 U.S. 245 (1987)).

The instant case is easily distinguishable from *Loretto* and its progeny because St. Johns does not *require* Modern to keep the flooded property Modern purchased in a flooded condition. Although St. Johns requires Modern to obtain a permit before draining the property, the permit requirement is not, under this Court's precedent, a taking:

> A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired.

U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985). Since St. Johns does not require or compel a physical occupation or invasion of Modern's property by flooding, there is no taking under *Loretto*.

Moreover, the fact that Modern can obtain a permit to drain its property prevents the flooded condition of the property from being permanent. Permanence of physical occupation is another requirement of a physical taking claim. "Our cases establish that even a minimal 'permanent physical occupation of real property' requires compensation." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (citing *Loretto*). The flooding of Modern's property is not permanent because the duration of the flooded condition is exclusively within Modern's control. The flooding continues only so long as Modern refuses to obtain a permit to drain the property. Once Modern obtains a permit, the physical occupation by floodwaters will cease. Accordingly, Modern's claim that it

is caught in a "catch 22" is disingenuous. (Petition at 33).[4]

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[4] Modern also attempts to argue that: "[t]he fact that St. Johns' regulatory scheme requires a permit and that such permit might be issued does not obviate, and, therefore, provides no defense to a *Loretto*-type physical invasion taking." (Petition at 20). Modern then asserts its characterization of *some of the evidence* presented at trial regarding this issue. The District Court, however, did not consider Modern's futility assertion to be valid. Modern seeks through this appeal to re-litigate a factual determination that was made by the District Court to reject the "futility" argument. There are many facts below which negate this contention pertaining to Modern's sale of substantial portions of this same property for the development of hotels, a restaurant, and a gas station. (Doc. 450 at notes 39-41 and accompanying text). Obviously, it was not futile for these purchasers to obtain the necessary permits. In addition, the evidence clearly showed that St. Johns did not foreclose the possibility of obtaining a permit, or indicate that a permit would be denied, which is the ordinary basis for a futility argument. *See, e.g., Taylor v. City of Riviera Beach*, 801 So. 2d 259 (Fla. 4th DCA 2001), *rev. denied*, 821 So. 2d 293 (Fla. 2002) (taking claim ripe; futility exception applied where development application under current comprehensive plan denied; not required to seek to amend comprehensive plan). Further, a hypothetical dispute as to the cost of obtaining a permit is not a valid basis for a futility argument. This issue must be vetted in an inverse condemnation proceeding pertaining to the denial of a permit, which is not ripe under Florida law in the absence of at least one meaningful permit application. *See, e.g., Glisson v. Alachua County*, 558 So. 2d 1030, 1036 (Fla. 1st DCA 1990), *rev. denied*, 570 So. 2d 1304 (Fla. 1990), citing, *McDonald, Sommer & Frates*, 106 S.Ct. 2561, 2566 (1986).

Moreover, the futility concept is a regulatory takings concept. As discussed in section I, it does not belong in this physical takings case in any event. Modern cites *Boise Cascade Corp. v. U.S.*, 296 F.3d 1339, 1345-46 (Fed. Cir. 2002) and *Azul Pacifico,*

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In sum, St. Johns' permitting requirements do not compel Modern to suffer permanent flooding of its property. Neither the District Court nor the Eleventh Circuit referenced or discussed *Loretto* simply because *Loretto* is not applicable to the facts at bar. The decision below does not conflict with *Loretto*, or any other case. There being no conflict, this Court should not grant the Petition.

Inc. v. City of Los Angeles, 948 F.2d 575, 578 (9th Cir. 1991) in arguing that "when an alleged taking occurs as a result of a physical invasion, the taking is ripe and [the] landowner need not exhaust administrative remedies since the physical invasion is itself final government action." (Petition at 21). Modern ignores that fact that the District Court found after a three week bench trial that there was no physical invasion, and that these findings have not been challenged on appeal. The rent control *regulation* in *Azul Pacifico* that was found to constitute a taking because it granted a *third party* certain rights in the plaintiff's property. Such is not the case here. Modern was simply required to obtain a permit, which it has refused to do. Modern's reliance on *Boise Cascade* is mystifying. That court, citing *Riverside Bayview* and other authorities, held that an agency's imposition of a permit requirement, without more, "simply cannot give rise to a compensable taking." *Id.* at 1350. *Loretto* was discussed and distinguished because the government "compelled landlords to allow cable companies to install boxes on their buildings." *Id.* at 1352. Again, these are not the facts in the instant case. St. Johns has not compelled Modern to accept a physical invasion by a third party, there was no physical invasion, and Modern's inability to drain its land is due solely to its failure to obtain a permit.

C. There Is No Legal Right Under Florida Law to Immediately Abate Flooding.

St. Johns is obligated to address misstatements of law contained in Modern's Petition. Supreme Court Rule 15. Modern inaccurately asserts in a number of places that it has a right under Florida jurisprudence to immediately abate any flooding of its property. This is a glaring misstatement of Florida law.

Modern contends that "the ability of Florida landowners to immediately abate the flooding of their property . . . is legally recognized and protected under the Florida Constitution, Florida Statutes and Florida nuisance and property law." (Petition at 15). The statement lacks any citation to legal authority.

Modern espouses a similar view of the law through the statement, "flooding is recognized under Florida law as both a continuing trespass and nuisance, which under the law of self-help, is immediately abatable . . . " (Petition at 15). This compound sentence is followed by citation to case law, but the cited precedent supports only the part of the compound sentence stating, "flooding is recognized under Florida law as both a continuing trespass and nuisance." Not one of the cited cases supports the part of the sentence claiming that "under the law of self-help [flooding] is immediately abatable."

Elsewhere, the Petition states "St. Johns' regulatory actions have . . . prohibit[ed] Modern from immediately abating the continued physical intrusion and occupation of its property by floodwaters."

(Petition at 18-19). Again, there is no cited authority for the implicit contention that Florida law gives Modern the right to "immediately abat[e] the continued physical intrusion and occupation of its property by floodwaters." Similarly, there is no supporting citation to legal authority for the contention that "Modern has the private proprietary right to immediately rid itself of [floodwaters]." (Petition at 20).

Finally, Modern incorrectly asserts that Florida has followed, at all times relevant to this case, the following English common law principle – "flooding resulting from failure to maintain a drainage ditch constituted an actionable nuisance abatable by immediate self-help." (Petition at 15). Whether flooding constitutes an actionable nuisance is irrelevant to the critical issue in this case of whether St. Johns caused flooding of Modern's property. St. Johns will address Modern's common law argument in the section of this brief refuting Modern's claim of a common law flowage easement.

Moreover, even if there was a right to immediately abate flooding under the law of England, that common law principle has been superseded by Chapter 373 of the Florida Statutes. Section 2.01, Florida Statutes, controls the effect that England's common law has in Florida. That provision provides, in pertinent part:

> The common and statute laws of England . . . down to the 4th day of July, 1776, are declared to be of force in this state; provided,

> the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state."

Under that provision, "the common law of England is in effect in Florida except insofar as it is modified or superseded by statute." *Wester v. Rigdon,* 110 So. 2d 470, 472 (Fla. 1st DCA 1959) (citing section 2.01, Fla. Stat.). Whatever the English common law was with respect to the immediate abatement of flooding, any such principle was no longer the law of Florida when Modern ditched and drained its property without a permit in 1997, because the permit requirements adopted in 1972 by Chapter 373, Florida Statutes, superseded the common law by establishing a permitting program. *See Southwest Florida Water Management Dist. v. Charlotte County*, 774 So. 2d 903, 907 (Fla. 2d DCA 2001) (in discussing a groundwater issue, the Court noted that "[p]rior to the Florida Water Resources Act of 1972, which is codified in Chapter 373, Florida Statutes, water rights were governed under Florida common law by the reasonable use rule," citing, *Village of Tequesta v. Jupiter Inlet Corp.*, 371 So. 2d 663 (Fla. 1979)) (footnote omitted). Accordingly, Modern has no legal right under Florida law to immediately abate the flooded condition of its property, even assuming such right did, at one time, exist under English common law.

III. THIS COURT NEED NOT OFFER AN ADVISORY OPINION AS TO THE EFFECT OF *SAN REMO HOTEL, L.P. v. CITY & COUNTY OF SAN FRANCISCO, CALIFORNIA,* ON MODERN'S RESERVED FEDERAL TAKINGS CLAIMS.

Modern's argument under Point II of its Petition presents no grounds for the exercise of the Court's discretionary jurisdiction. The Point posits no argument that the Eleventh Circuit's decision is in conflict with any other court's decision, or that the Eleventh Circuit decided an important question of federal law that has not been, or should be, settled by this Court. *See* Supreme Court Rule 10. Instead, Modern seeks an advisory opinion from this Court on an issue that never factually or legally arose in this case.

In *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005), this Court found the Ninth Circuit correctly barred a federal takings claim which had previously been litigated to final judgment in state court. The claim was barred because 28 U.S.C. §1738 mandates that federal courts give preclusive effect to state court judgments, even though the takings claim would not have been ripe for litigation in federal court in the first instance and the plaintiff reserved the federal takings claim in state court.

In the case at bar, the District Court did not bar any claim or issue presented by Modern for which the preclusion holdings of *San Remo Hotel* could be remotely relevant. Consequently, Modern seeks the

Court's exercise of jurisdiction to resolve an issue that is nonexistent and hypothetical. *See North Carolina v. Rice*, 404 U.S. 244, 246 (1971) ("Early in its history, this Court held that it had no power to issue advisory opinions"). Therefore, the petition for a writ of certiorari should be denied.

IV. THE DECISION BELOW PROPERLY REFUSED TO QUIET TITLE IN MODERN'S FAVOR TO A NONEXISTENT FLORIDA COMMON LAW DRAINAGE EASEMENT IN DITCHES ON THE LOWER PROPERTY.

The quiet title action against the United States is set forth in Count IV of the Complaint. (Doc. 71 at 13-14). Modern asked the District Court, in pertinent part, to "[a]djudicate the existence, location, scope and extent of the PLAINTIFFS' drainage easements in the Drainage System."[5] *Id.* at ¶14.b. The court granted judgment for the United States on this count (Opinion at 30), concluding that Modern had no easements, common law or otherwise, in the alleged "drainage system."[6] Modern inaccurately complains

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[5] The "Drainage System" was described as "an extensive drainage canal system that was dug to serve a large land area east of Titusville along the St. Johns River, including the [Modern] Property (the "Drainage System")." (Complaint, ¶13). Modern alleged that it had "express, implied, and common law drainage easement rights in the Drainage System." (Complaint, ¶17).

[6] In its argument that the decision below constituted a judicial taking, Modern specifically references "its common law

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that by refusing to quiet title in its favor to the alleged common law easement, "the existence, location, scope and extent of Modern's common law flowage easement [in the drainage system] was not adjudicated." (Petition at 28).

A. The Issue Involves Only State Law and is Not of Constitutional Dimensions.

By its terms, the federal Quiet Title Act, 28 U.S.C. §2409(a), is a procedural vehicle that allows the United States to be named as a defendant in a civil action to adjudicate a disputed title to real property. The substantive real property issues are governed by state law. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378-379 (1977).

Modern's argument suggests only the correction of perceived error relating to interpretation of Florida law regarding the existence of an alleged common law drainage easement in a remnant drainage system. Contrary to Modern's claim, the District Court's conclusion that Modern did not have a common law easement to improve and maintain drainage ditches *on another person's property* does not raise any issue of constitutional dimensions. While this Court could take the time to determine whether Florida law recognizes such a common law easement, that is not

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flowage easement rights in the drainage canal system." (Petition at 29-30).

the kind of issue this Court ordinarily addresses. *Braxton v. U.S.*, 500 U.S. 344, 347, 111 S.Ct. 1854, 1857 (U.S. 1991) ("A principal purpose for which we use our certiorari jurisdiction ... is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law"). For this reason alone, the Petition should be denied.

B. Under Florida Law, An Upper Landowner Does Not Enjoy A Common Law Drainage Easement to Improve and Maintain Drainage Ditches Across The Lower Owner's Property.

Modern builds its argument before this Court on the 1884 Blackstone *Commentaries on the Laws of England* ("the *Commentaries*") (Petition at 10-11). At the same time, Modern makes no mention of the dispositive Florida case regarding surface water flowage rights between adjoining landowners, *Gus Machado Buick, Inc. v. Westland Skating Center, Inc.*, 542 So. 2d 959 (Fla. 1989) ("*Westland*"), discussed below. Modern argues from the *Commentaries* for the first time in its appeals before the Eleventh Circuit and this Court, having failed to ask the District Court to take judicial notice thereof, and failed to reference or otherwise discuss the *Commentaries* before the District Court. Modern uses ellipses to juxtapose incomplete quotations from two different chapters of

the *Commentaries* in a way they do not appear in the book.[7] Regardless, the principle Modern relies upon is not relevant to this case and does not reflect Florida law related to surface water drainage, which is set forth in *Westland*.

First, Modern's argument proceeds from a factual premise not present here: "[s]o ***if*** my neighbor ought to scour a ditch, and does not, whereby my lands (sic) is overflowed, this is an actionable nuisance." (Petition, n.7; emphasis added). Thus, if an English landowner's neighbor *assumed an obligation to scour a ditch*, presumably through a contract or other written document, and then failed to honor that obligation, the landowner would then have a nuisance action against the non-performing neighbor. Those are not the facts of the case at bar. This case contains no evidence, much less a factual finding, that any of Modern's neighbors were obligated to keep the drainage ditches clean. Accordingly, the common law principle described by Modern, even if correct, would be factually inapplicable.[8] As Florida's Supreme Court

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[7] The first sentence of the footnote combines a quotation from a sentence in chapter 13, page 217, with a partial quotation from a sentence in chapter 1, page 5. The second sentence of the footnote contains a partial quotation from a sentence in chapter 1, page 5.

[8] However, as previously discussed, "immediate self-help" is not the law in Florida. Section 2.01, Florida Statutes, adopt the common law of England only to the extent not superseded by the Florida Constitution or statutory law. Chapter 373 is statutory law that superseded any right of immediate self-help, assuming such a right existed under English common law.

has stated, it is "only when the common law is plain that we must observe it." *Duval v. Thomas*, 114 So. 2d 791, 795 (Fla. 1959) ("our own research has not divulged the clear, unambiguous pronouncement of the common law in effect 4 July 1776, that would leave us no room but to adopt it in this case under the mandate of Sec. 2.01 [Florida Statutes]").

In addition, even if the *Commentaries'* "immediate self-help" principle were applied herein, Blackstone states that a nuisance may be abated only so long as the party abating the nuisance "commits no riot in doing it." (*Commentaries* at 5). In this case, the record establishes that hundreds of acres of wetlands, a considerable portion of which were within a national wildlife refuge, were drained as a result of Modern's illegal, unpermitted activity. (Opinion at 7).

Modern's claim of a right to "immediate self help" is also defeated by the factual findings of the District Court that there was no blockage of drainage ditches *within the Refuge* that caused flooding of Modern's land. The NS1 ditch, which the lower court found to be Modern's primary drainage relief (Opinion at 7, 23), is largely located on Modern's land. (Opinion at 6). Modern's land has direct and unimpeded drainage through NS1 to the south and through the Indian River City Canal ("IRCC") to the west.[5] Thus, there is

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[5] (Opinion, Map at Appendix). Although the IRCC is located within the Refuge, this ditch was improved by Brevard County at Modern's behest without objection from the Refuge and currently provides a positive westerly drainage outfall. *Id.*, *see*

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no need for Modern to drain its land through the Refuge. The sole reason for the allegedly un-drained condition of Modern's property is Modern's failure to apply for a permit to drain its land while not causing harm to the Refuge. Development of land in a manner that does not adversely affect adjoining properties is a primary purpose of the water management permitting program Modern has stubbornly disregarded.

Last, but by no means least, there is no nuisance to abate in this case because, as discussed below, a lower landowner has no duty under Florida common law and judicial decisions to maintain a ditch on its property for the benefit of the upper owner. Nor is there is a right under Florida common law or judicial decisions for an upper landowner to enter upon a lower landowner's property to construct or maintain a drainage ditch in the absence of an easement that is lawfully created by a written instrument or prescription. This Court can take judicial notice of the fact that Florida was subject to numerous failed land development schemes in the 1920s time frame (such as the one in this case) involving construction of drainage ditches that have since gone into disrepair. It would wreak havoc if landowners could assert a right to enter upon a neighboring landowner's property, without the owner's permission, to re-dig

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Brevard County motion for summary judgment, Doc. 182-1, 304; Transcript:1803-06.

drainage ditches that had not been maintained for decades.

Modern advanced a variety of arguments below regarding creation of an easement by a written instrument, implication from a written instrument and implication at law. (*See, e.g.*, Modern's summary judgment motion; Doc. 289). Modern failed to plead creation of a prescriptive easement, and was prevented by the District Court at the pre-trial conference from proceeding to trial on this basis. (Doc. 377 at 39). The District Court, after considering all the evidence, rejected Modern's easement claims, and these rulings have not been challenged in this appeal. Instead, Modern seeks to assert under the common law a right that does not exist in the absence of a validly created easement.

Modern fails to cite *Westland* because Florida's Supreme Court spoke with disfavor about "self-help" drainage remedies. *Westland* adopted the reasonable use rule as described by the court in *Seminole County v. Mertz*, 415 So. 2d 1286 (Fla. 5th DCA 1982), *rev. denied*, 424 So. 2d 763 (Fla. 1982):

> Courts of Florida have applied, in an almost unbroken line of decisions, practically all of the elements of the modified civil law rule of surface water. F. Maloney, S. Plager, R. Ausness, B. Canter, *Florida Water Law* 617 (1980) [hereinafter cited as Maloney & Plager]. The general rule today is that ***the upper owner may improve and enhance*** the natural drainage of ***his land*** so long as

> he acts reasonably and does not divert the flow, and that the lower owner is subject to an easement for such flow as the upper owner is allowed to cast upon him. Maloney & Plager at 592.

Westland, 542 So. 2d at 962, *quoting,* 415 So. 2d at 1289 (emphasis added). Thus, the flowage "easement" discussed in *Westland* requires the lower owner to accept the natural surface flow "cast upon him" by the upper owner, provided the upper owner does not unreasonably increase the lower owner's burden. Under *Westland,* the lower owner must accept this diffused surface flow, *but is not obligated to maintain a ditch on its property to accelerate the flow for the benefit of the upper owner*. Nor is it written anywhere in Florida jurisprudence that the common law allows the upper owner to trespass on the lower owner's land to construct or maintain a drainage ditch. The lower owner's obligation is simply to not obstruct the natural flow of surface waters by building a berm. There was no allegation or evidence herein that USFWS had constructed a berm to block the natural, diffused surface flow from Modern's land.

The *Westland* court viewed the decision before it as involving whether Florida should adopt the "common enemy" rule discussed in *Edason v. Denison*, 142 Fla. 101, 194 So. 342 (Fla. 1940), a case upon which Modern relies (Petition at 12); the strict civil rule law; or a modified civil law rule, which the court referred to as the "reasonable use rule," discussed above. In rejecting the common enemy rule in favor of the

reasonable use rule, the court discussed the potential harm associated with self-help engineering by adjoining landowners: "While the common enemy rule permitted the free improvement of property, it also carried with it the potential burden of self-help engineering contests in which the winner was the person who most effectively turned the excess water upon his neighbor's land." *Westland*, 542 So. 2d at 961. Because the Florida Supreme Court rejected the concept of unreasonable drainage improvements on one's own land, there clearly is no "self-help" easement for drainage improvements on someone else's land, the kind of easement Modern claims here.

Not one of the cases cited by Modern actually supports its argument that Florida recognizes a common law right to go onto a lower owner's property and reconstruct remnant ditches to improve drainage of the upper land. Modern incorrectly asserts that *Lamb v. Dade County*, 159 So. 2d 477 (Fla. 3d DCA 1964) stands for the proposition that the "landowner has [the] right to enter on private property upon which [a] drainage canal is located in order to clean out and maintain [the] canal, and ownership of [the] canal does not vest [the] owner with legal right to obstruct or cutoff flow unreasonably." (Petition at 13, n.9). *Lamb*, however, involved the judicial interpretation of a previously existing easement that had been created by prescription. *Lamb*, 159 So. 2d at 479. There, the underlying fee owner was enjoined from constructing a dam that interfered with the natural flow of the canal, flow to which the upper landowner

was legally entitled through operation of the prescriptive easement. *Id.*

Modern also cites *Stoll v. MacPherson Duck Club, Ltd.*, 607 P.2d 1019 (Colo. Ct. App. 1979), a Colorado lower court decision that involved ditches following the natural drainage and in existence and used for 70 years. (Petition at 14, n.9). No court has ever cited *Stoll* and the case does not reflect Florida law. Moreover, *Stoll* is inapposite to the facts at bar because the remnant ditches herein do not follow any natural watercourse, as they did in *Stoll*. *Id.* at 1021. Here, the predecessor land development company constructed a rectangular grid of ditches across a large, flat, floodplain area, which did not improve upon any natural depressions in the land to increase conveyance capacity. (Opinion at 2-3). In addition, the ditch in *Stoll* was in continuous use since its inception, while the ditches herein fell into great disrepair, not having been maintained since 1958. *Id.* at 29. Finally, *Stoll* did not discuss a legal theory upon which the drainage rights were created. There was no mention of any rights accruing under the common law. The drainage rights may have been created by prescription, or created under an easement implied in law, a type of easement asserted below, fully adjudicated, rejected by the District Court (Doc. 458 at 9-12; Doc. 458 at 13-18), and not at issue in this appeal.

The remainder of the cases Modern cites in Section I.A. of its petition are inverse condemnation cases that involve flooding claims based upon established land rights. They do not bear upon

Modern's assertion that an upper landowner may, without the lower owner's consent, enter the lower owner's property and reconstruct remnant drainage ditches.

V. THERE COULD NOT BE A JUDICIAL TAKING BECAUSE AN UPPER LANDOWNER DOES NOT ENJOY A COMMON LAW DRAINAGE EASEMENT UNDER FLORIDA LAW IN DRAINAGE DITCHES EXISTING ON LOWER PROPERTY, EVEN ASSUMING SUCH A TAKING CLAIM EXISTS AND IT PROPERLY COULD BE BROUGHT HERE FOR THE FIRST TIME IN THIS APPEAL.

For the first time in this case, Modern asserts that the District Court's decision constitutes a "judicial taking" of what Modern characterizes as its "well established common law flowage easement rights." (Petition at 32). This judicial taking claim was not raised below. It is respectfully submitted that it should not be addressed for the first time by this Court. However, were this Court to consider the claim, it would find the claim to be meritless.

As previously discussed, state law determines real property issues. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378-379 (1977). If a state's highest court changes its definition of property in a way that causes property owners to be deprived of their previously recognized

"property," then one could make a non-frivolous argument for a judicial taking of that property. That is not what happened in the instant case. Here, a federal judge reviewed the case law cited by the parties, concluded that Florida law did not recognize a common law drainage easement to improve and maintain remnant drainage ditches on another person's property, and declined to quiet title to a non-existent easement.

Significantly, the Petition advances no argument suggesting a source of authority for a federal District Judge to change existing principles of state property law. However, for purposes of argument, St. Johns will assume that a federal District Judge does have such power, and will further assume that this Court would recognize a claim of "judicial taking." Modern's argument nevertheless fails because it is based on the false premise that Florida law, prior to the District Court decision below, recognized a common law right to enter upon someone else's land to re-excavate remnant drainage ditches. As explained in detail in Section IV, a common law easement of that nature has never been recognized under Florida law. Consequently, the prerequisite change to Florida law by the judicial branch of government has not occurred, and there was no judicial taking of a previously existing drainage right. The Petition should therefore be denied.

The Petition mystifyingly claims that the "outcome [of this case] directly conflicts with this Court's decision in *Palazzolo v. Rhode Island*, 533 U.S. 606

(2001)" without explaining the conflict. (Petition at 29). *Palazzolo* has nothing to do with drainage easements under Florida law; nor does it involve a flood-taking claim. This case and *Palazzolo* are not even remotely similar. Therefore, the decision below and *Palazzolo* do not conflict.

CONCLUSION

For the reasons stated above, St. Johns respectfully requests that Modern's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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